

Written Testimony on behalf of the  
Coalition Against Unsolicited Commercial Email  
by Ray Everett-Church, Co-Founder and Counsel \1  
before the United States Senate  
Communications Subcommittee  
June 17, 1998

Thank you Mr. Chairman and members of the Committee. I am very grateful to have been asked to speak to you today on behalf of the Coalition Against Unsolicited Commercial Email, also known as CAUCE. CAUCE is an all-volunteer, ad hoc group of owners and operators of Internet-based businesses, service providers, technology professionals, and consumer activists. We are now the largest Internet advocacy group in the United States with over 10,000 registered members in nearly every state. Our coalition was formed to advocate for a legislative solution to the problem of "junk email," because it has become clear to us that technical and self-regulatory solutions have proven to be no solution at all.

The Coalition represents a wide range of Internet users and Internet-based businesses. Our Board of Directors includes long-time Internet Users, the owners of two small ISPs, a marketing and public relations professional, a lawyer, a college student, and the author of the best-selling book *The Internet for Dummies*. What we all have in common is that we make our livings, to some degree or another, from the Internet. We all want the Net to thrive, and we want to do business online. We are willing to pay our own way, but we are not willing to subsidize the advertising of others.

I should note that I have been authorized to say that my remarks today also represent the views of our colleagues at the Forum for Responsible and Ethical Email (FREE). Their founder, Jim Nitchals, passed away quite unexpectedly a little over a week ago. I know Jim was very much looking forward to these hearings and I'm sure watching from above on this important day for the Internet.

Unsolicited Commercial Email Threatens  
the Future of Online Commerce

Let there be no mistake that this is an important day for the Internet; you are taking up an issue of tremendous importance for the future of online commerce. As a greater and greater percentage of our gross domestic product revolves around the explosion of computer-related and Internet-related commerce, I do not exaggerate when I say that junk email has the potential to harm our economy in ways that terrorists could only dream about.

The technology news media reports with alarming frequency system crashes and network outages caused by junk email attacks. Junk email has knocked out systems belonging to major Internet service providers such as AT&T,\2 @Home,\3 Pacific Bell,\4 Netcom,\5 GTE,\6 and literally hundreds of smaller ISPs serving rural communities across the nation. And the volumes of junk email are increasing every day.

If junk email were as innocuous as the mail ads you get through the U.S. Postal Service, we would probably not be discussing this here today. But the fact that your committee is holding these hearings today is testament to the fact that junk email - also called UCE, unsolicited commercial email, and "spam" - is a very different animal with tremendous costs and

consequences for the future of the Internet. There are some who would have you believe that junk email is no different from any other type of advertising media, but I urge you not to believe that. There is no other medium quite like junk email in its ability to damage Internet systems and impede legitimate Internet commerce. I know of no more efficient means of consuming the time, money and resources of millions, against their will.

#### Unsolicited Commercial Email Shifts Tremendous Costs Onto Recipients

Unlike virtually every other communications medium, the majority of email costs are paid by the recipients - not the sender. This is, for better or for worse, the nature of the Internet. It grows out of the cooperative arrangements upon which the Internet was created, where each participant pays for their portion of the infrastructure. This means that once an email is sent, whether it is an advertisement or a letter from a college student to her parents, the costs for relaying, transmitting, receiving, storing, and downloading the message borne by any number of people, except the sender. When you are not paying the freight, as is the case with the sender, it is only natural to be less concerned with the costs involved. And therein lies the problem.

Even if the problem were limited to just one or two messages a day, forcing a recipient to pay for receiving advertising would be unacceptable, but we are not talking about just a few messages. I know this first hand: During calendar year 1997, the email account I use for my business received over six thousand pieces of junk email, weighing in at 41 megabytes of data. That is an average of sixteen (16) pieces of junk email each day. Indeed, the economics of junk email create a strong incentive to send such mail as frequently and as broadly as possible. Given that the cost of sending one hundred messages is the same as one million, a mailer has every incentive to send his message to as many e-mail addresses as possible. With such a miniscule investment, even if only one out of every million recipients buys the mailer's miracle cure or multi-level marketing scheme, not only will he have recovered his tiny investment, he may well have turned a handsome profit.

The problem with junk email stems from the realization by unscrupulous mass marketers that they can force unwanted and unwelcome messages on millions of consumers, with just the touch of a button, at virtually no cost to themselves. For less than a hundred dollars, you can outfit your computer with all the necessary hardware and software to generate a million pieces of junk email each day. You can even buy databases of email addresses on CD-ROM; the going rate right now is under \$10.00 per million addresses. Top it off with an unlimited Internet account for \$19.95, and a junk emailer is born.

While the costs are small for the junk mailers, the same cannot be said for the people who have to transport, process, store, and retrieve that email. Millions of Internet users, businesses and consumers alike, pay for their access to the Internet in increments of time. Many more, particularly those in rural communities and those who travel extensively, must make toll calls to obtain a connection. For these individuals, each unsolicited commercial message they receive is like a telemarketer's call to their cellular phone - they pay to receive messages they did not ask for and inevitably do not want. Like many millions of people, I pay for my Internet access by the

minute. I estimate that the Internet connection time alone for those six thousand unsolicited messages cost me in the hundreds of dollars - and that is before I even begin to calculate the amount of time wasted in sorting through all that junk to find my important email.

It also presents a problem for those who do not immediately review their e-mail. When these individuals do check their electronic mailboxes, they find they must wade through dozens of unsolicited advertising messages in order to find their legitimate email. During that time, their company or service provider has been forced to store that tremendous volume of mail until the user can retrieve it. Just a few days worth of junk email for a service provider the size of America Online would easily fill all the disk storage space of all the computers in all of the offices on Capitol Hill.

Junk email forces Internet users to become a captive audience for whatever advertising message anyone wishes to send them, at any time, any number of times. Yet the hard costs are miniscule when compared to the non-monetary costs of junk email. Unlike direct mail from the post office, junk e-mail arrives throughout the day at home and at work, and there is no effective technical means of blocking it.<sup>7</sup> Junk email in the workplace interrupts employees who must wade through pornographic ads and "get rich quick" schemes to find work-related email. Parents and their children often have no choice but to accept, pay for and dispose of these unwanted and sometimes highly offensive messages. Major junk email campaigns can also knock out Internet systems, resulting in lost data, lost business, and lost productivity.

#### The Economics of "Junk Email" Encourages Massive Abuse

When turned into an advertising medium, the skewed economics of email turn traditional notions of advertising on their head. In virtually no other advertising medium does the advertiser get to force the recipient to bear more costs than they do. At least with television, print ads in newspapers, or advertisements in the U.S. Mail, the sender incurs significant initial costs and is forced to target their advertising carefully because each additional ad bears an incremental cost. But in the world of junk email marketing, it costs no more to send the first email than it does to send the ten millionth email. Thus, there is every incentive for the marketers to cast their advertisements as widely and indiscriminately as possible.

Not only is there no incentive to carefully target the mailing lists, there isn't even an incentive to reduce duplication. So today many people, myself included, regularly receive multiple copies of the exact same advertisement.<sup>8</sup> And why not? When advertisers pay so little of the costs involved, there is no incentive for them to be careful; indeed, time spent on editing a mailing list is time wasted.

You will undoubtedly hear from representatives of the marketing industry who will say that electronic mail represents a low cost method of marketing which will put mass advertising into the hands of even the smallest businesses. That is certainly true. But what they never acknowledge is that what makes junk email so inexpensive is that every recipient is forced to subsidize that advertising whether they want to or not. I am continually astonished that the marketing industry defends the need for junk emailers to steal money and resources from their would-be customers. No other industry

would dream of stealing from potential customers in this fashion, and no other industry would dare come before Congress and ask that their right to steal from the public be protected.

For this reason, many people have called junk email a form of "postage due" marketing. I am not so charitable. Quite simply, I call it theft. It is stealing the time, money, and resources of others against their will. And any legislation that sanctions the sending of unsolicited email, however well-intentioned, does nothing short of legalizing a kind of theft. Therefore I urge the members of this committee to reject any so-called solution which would permit the practice of theft by email to continue.

#### The Threat to Businesses and Service Providers is Enormous, and Growing

I am sure you will hear horror stories from many Internet Service Providers about the volumes of junk email coursing through their systems, but some larger companies have publicly estimated that upwards of 30% of their daily email traffic is junk email. As a former consultant to America Online's email administrators, I can tell you that they have made major investments in equipment and personnel to keep their systems running in the face of the onslaught. Companies like Hotmail, AT&T, Earthlink, UUNet, Netcom, CompuServe, and Erols also invested millions and hired numerous full time administrative staff to do nothing but combat the effects of junk email.

But I am not here today to tell you about the problems of large ISPs - they will tell you that themselves. I am here to tell you that even a fraction of AOL's daily junk email dose is more than enough to put small businesses and small Internet Service Providers out of business. With more and more companies conducting their critical business over the Internet, junk email is costing those businesses millions. Moreover, junk email threatens to put hundreds of small ISPs out of business, particularly the kinds of small, local service providers who provide the only cost-effective Internet access to thousands of consumers, businesses, and schools in rural areas all across the United States. Even as I speak, this committee and others in Congress are debating whether FCC-imposed fees should subsidize Internet access for schools and libraries. As you wrangle over that issue, let me remind you of this fact: junk emailers peddling porn sites and miracle potions are already subsidizing themselves on the backs of schools, libraries, businesses and consumers all across this nation.

CAUCE has heard from many dozens of small and mid-sized ISP all across this country, all of whom are crying out for relief from the damaging and costly practices of unscrupulous advertisers. Technology shows little promise of solving the problem, and hauling junk mailers into court on cutting-edge theories in cyberspace law is just not a reasonable or affordable answer. Small ISPs exist on notoriously tiny profit margins. Seemingly little things, such as the number of milliseconds it takes for a computer to process a piece of email, become looming problems when you are facing the demands of Internet services. For an Internet Service Provider, the processing capacity of their mail servers is a precious commodity and when their systems are tied up processing junk email, it creates a drag on all of the services they provide to their customers.\9

The problem is also compounded by the fact that ISPs purchase bandwidth - their connection to the rest of the Internet - based on projected usage by

their prospective user base. For most small and mid-sized ISPs, bandwidth costs are among one of the greatest portions of their budget and contributes to the reason why many ISPs have a tiny profit margin. Without junk email, greater consumption of bandwidth would normally track with increased numbers of customers. However, when an outside entity (e.g., the junk emailer) begins to consume an ISP's bandwidth, the ISP has few choices: One, let the paying customers cope with slower Internet access, occasional crashes, and degraded services; two, eat the costs of increasing capacity; or three, raise rates. No matter the choice, the recipients are still forced to bear costs that the advertiser has avoided.

The Nobel Prize-winning economist Ronald Coase has written eloquently about the damage done to the economy when these kinds of costs are chronically externalized onto an ever-widening base. In his writings, Coase has discussed the dangers to the free market when an inefficient business - one that cannot bear the costs of its own activities - distributes its costs across a greater and greater population of victims. What makes this situation so dangerous is that when millions of people only suffer a small amount of damage, it becomes too costly for the victims to recover their tiny share of the overall damages. Such a population will continue to bear those unnecessary and detrimental costs unless and until their individual damage becomes so great that those costs outweigh the transaction costs of fighting back.

The classic example is pollution: It is much cheaper, in raw terms, for a chemical manufacturer to dump its waste into the local river. Such externalities allow one person to profit at another's - or everyone's - expense. Certainly those who are harmed might have a cause of action under civil law to recover their actual damages. But for the vast majority of victims, there are significant transaction costs involved in bringing individual lawsuits. For most, those costs will prohibit them from ever seeking redress. As a result, the skewed economics of pollution will give incentive to the polluters while making it prohibitive for victims to seek a remedy. Much is the same when it comes to junk email. While some companies have successfully sued junk emailers for the damage they have caused, very few ISPs can afford to fight these kinds of cutting edge cyberlaw battles.<sup>10</sup> As a result, the economics favor the abusers and disfavor those victimized. Indeed the mailers are counting on the fact that their incremental theft will not be noticed or that people will just hit the "delete" key and move on. They hope that if they steal only a tiny bit from millions of people, very few will bother to fight back.

As Coase pointed out, this is a prescription for disaster. When inefficiencies are allowed to continue, the free market no longer functions properly. As we all remember from our college Microeconomics classes, the 'invisible hands' that would normally balance the market and keep it efficient cannot function effectively when the market is carrying dead weight and perpetuating chronic inefficiencies. Unchecked, businesses that are otherwise unprofitable will indefinitely leech off the indirect subsidies they extract from the public at large.

In the context of the Internet, the costs of these externalities can be seen every time you have trouble accessing a web site, whenever your email takes 3 hours to travel from AOL to Prodigy, or when all your email is lost in an ISP server crash. But the costs do not stop there. With junk email already the number one complaint of most Internet users, consumers have deserted

many public discussion forums for fear that their email addresses will be "harvested" and added to junk mail lists. Customers are afraid to give their addresses out in legitimate commerce for fear of being added to and traded among thousands of mailing lists. Legitimate businesses are afraid to use email to communicate with their existing customers for fear of being branded "net abusers."

#### Congress Has Acted to Stop Cost Shifting Before

In the pollution context and in many other situations where the marketplace has failed to maintain its own natural equilibrium, governments have appropriately stepped in to alter the skewed economic balance. By enacting substantial fines and penalties as a matter of public policy, governments have remedied the marketplace failure and made responsible behavior more cost effective. A perfect case in point is the federal statute that outlawed the sending of unsolicited advertisements via fax machine.

Email is increasingly becoming a critical business tool in much the same way as the fax machine became an indispensable tool during the late 1980s. As more and more businesses began to use fax machines, marketers decided that they could fax you their advertisements. For anyone in a busy office in the late 1980s, you will undoubtedly remember the piles of office supply catalogs and business printing ads that came pouring out of your fax machine. On far too many occasions, you had to shut off the fax machine in mid-advertisement so your business colleagues could try and send their fax before the advertiser could redial.

The similarities between junk faxes and junk email are many: both forms of advertising shift the costs onto recipients, both of them tie up expensive resources without compensation to the victims, and both require federal legislation to cure. There are also some compelling differences that make email more pernicious than faxing. Certainly the average email costs a recipient less than a fax, however you cannot easily send ten million faxes at the touch of a button the way you can with email. In addition, the fax advertiser must bear some marginal cost for each fax sent, particularly if a long-distance call is involved. But with junk email, recipients and ISPs bear most of the cost while the advertiser bears little - and with a few keystrokes, you can quadruple the amount of damage done. With greater and greater abuse not merely a possibility, but an everyday reality, a legislative solution as strong as the junk fax prohibition becomes a necessity.

When looking for a legislative solution to the problem of junk email, we found that the fax statute, 47 USC 227, has been tremendously successful at virtually eliminating the problem of junk faxes and points the way to a real and meaningful solution to the problem of junk email. Therefore we strongly urge the passage of Representative Smith's bill, H.R. 1748. The bill is a model of logic and simplicity. It assures that those who wish to receive such mass mailings can continue to do so by simply asking, while those who do not want them, will not get them, or will have a legal remedy if they do.

#### S. 1618 and H.R. 3888 Portend Disaster for the Internet

Just as we find H.R. 1748 a clear solution, we find S. 1618 and its House

counterpart H.R. 3888 to be a tremendous threat. Although CAUCE endorses the intent behind Senator Murkowski's and Senator Torricelli's amendment to the anti-slamming bill, we are deeply concerned that this proposed law will, if anything, make the burden on businesses and consumers even greater.\11

As written, the bill sets basic standards of legality that are easily met, even by today's current crop of disreputable scammers and brazen porno spammers. The legislation would allow marketers to indiscriminately send massive volumes of email with no recourse for the victim other than begging to be taken off the list. Furthermore, by placing enforcement solely in the hands of government bureaucracies, we believe it is unreasonable to expect that the Federal Trade Commission will ever be able to ferret out thousands of violators operating out of their basements. Finally, the legislation could be seen to preempt state laws on junk email.\12

By setting such a low threshold for legitimacy, we fear it would allow for increasing volumes of junk email. In fact, CAUCE has already received numerous reports of junk emailers making slight modifications to their tactics and proclaiming that their mail is protected by the Murkowski-Torricelli amendment. It is a very bad sign when the "remedy" for a problem gives cover to the most egregious abusers.

We should not presume, as S. 1618 and H.R. 3888 appear to do, that people are willing to incur both direct and indirect costs for advertisements that they did not ask for and invariably do not want. These bills would force people to continuously incur out-of-pocket monetary costs, unless and until they spend more time and money getting themselves removed from thousands of mailing lists they did not ask to be on in the first place. Because of the almost limitless potential for continued abuse under S. 1618 and H.R. 3888, CAUCE believes that this legislation has the consequence of legitimizing massive abuse, making things worse than the status quo, thereby contributing to the demise of email.

#### H.R. 1748 is an Effective, Narrowly Tailored, and Constitutional Approach

Legislation is desperately needed, as it was in the case of junk faxes, to stop the cost-shifting problem inherent in junk email. Because the cost shifting nature of junk email is so similar to junk faxes, CAUCE believes that amending 47 USC 227 is a well-tailored solution to the problem. H.R. 1748 amends the anti-junk fax statute to prohibit the sending of unsolicited commercial advertisements by email. Like the fax law, it defines a deceptive and unfair business practice that is damaging and costly to consumers and sets statutory damages. In doing so, it counterbalances the economics of junk email and places enforcement in the hands of the consumer, not in the hands of any government agency.

Although some have questioned the constitutionality of H.R. 1748's approach, let me assure you that there is ample precedent for supporting Representative Smith's legislation. When addressing a similar issue of unsolicited advertisements, the Supreme Court said it best in the case of *Rowan v. U.S. Post Office*:\13

Nothing in the Constitution compels us to listen to or to view any unwanted communication. . . . We categorically reject the notion that a vendor has a right under the Constitution or otherwise to send any unwanted communication

into the home of another. . . . We repeat, the asserted right of a mailer stops at the outer boundary of every person's domain.

In another Supreme Court case, *Breard v. Alexandria*,<sup>14</sup> the Court upheld the constitutionality of a local ordinance prohibiting door-to-door solicitation, stating that it is a misuse of the guarantees of free speech to force anyone to admit solicitors against their will. In *Bland v. Fessler*,<sup>15</sup> the Ninth Circuit upheld California's ban on the use of automated dial and delivery devices, ruling that advertisers had no right to turn consumers into a captive audience, forcing them to receive any message the advertiser wished to send. The Ninth Circuit concluded such a prohibition was a reasonable time, place and manner restriction and was reasonably tailored to serve the state's substantial interest in protecting peoples' right to be left alone.

In addition to these fundamental precepts, every court to look at the constitutionality of the junk fax law, upon which H.R. 1748 is based, has upheld its constitutionality. In *Destination Ventures v. FCC*,<sup>16</sup> the Ninth Circuit, after noting that commercial speech receives less protection than political or religious speech, concluded that the statute served a substantial government interest in preventing recipients from having to bear the cost of third party advertising. It found that the prohibition on junk faxes directly advanced that interest. That is the very same interest served by H.R. 1748.

In this and other regards, H.R. 1748 is the antithesis of the Communications Decency Act. The approach in H.R. 1748 comes from the Internet community, by their request, rather than being enacted over the objections of an unwilling Internet community. As was argued in the CDA challenge, the government should not be in the position preventing people from viewing material that they want to see. Representative Smith's bill would do just the opposite: It protects people from being forced to view material that they don't want to view while preserving their right to see it upon request.<sup>17</sup> Finally, any remaining questions about free speech issues can be assuaged by the fact that H.R. 1748 has received wide-spread praise from staunch supporters of free speech and has been endorsed in editorials by USA Today, The Seattle Times, The Philadelphia Enquirer, and The Sacramento Bee, among others.

#### Congress is Justified in Acting to Protect the Email Infrastructure

Like the fax machine before it, electronic mail is a marvelous tool of business and personal communication. It is simple, it is accessible, and it is becoming more and more an indispensable part of our professional lives. But there are even more far-reaching potentials of email that may be lost if its functionality and utility are destroyed by the proliferation of junk email.

The Internet is an incredible tool for spreading information critical to the development of freedom and democracy around the world. Indeed, email is often cited as a critical tool for communicating with and between Chinese democracy activists. Recent media stories have also credited email as a critical tool in the overthrow of the Suharto regime in Indonesia.<sup>18</sup> If Congress does not take immediate steps to rescue email from the grips of snake-oil salesmen, there are real implications for the growth of free



speech and democracy both at home and abroad.

Electronic mail is a marvel of accessibility and ease of use for tens of millions of Americans, and is a critical growth component of America's young Internet economy. Yet in just a few short years, unsolicited advertisements by email have already begun to strangle Internet commerce in its crib. Unless Congress acts to preserve the viability of the medium, today's crop of scammers and thieves will soon give way to more legitimate marketers who will replace the flood of offensive and fraudulent messages with even greater quantities of ads for snack chips and laundry powder. When that terrible day comes, our electronic mailboxes will cease to be a useful tool for business and personal communications and we will have squandered one of the most powerful tools of communication this planet has ever known. On behalf of the Coalition Against Unsolicited Commercial Email, I urge you to protect Internet commerce against the damaging and costly effects of junk email. No less than the future of electronic commerce and our information economy may be at stake.

Thank you, Mr. Chairman. I would be happy to answer any questions the committee might have.

#### Footnotes:

\1 This testimony was prepared with the advice and assistance of the CAUCE Board of Directors: Scott Hazen Mueller, Chairman, John Mozena, John Levine, Doug Muth, J.D. Falk, Edward Cherlin, Corey Snow, George Nemeyer, and Ray Everett-Church. Some portions have been excerpted from the testimony of David H. Kramer, Esq., before the Washington State Legislature. Mr. Kramer may be contacted at Wilson Sonsini Goodrich & Rosati, Palo Alto, CA 94304, (650) 493-9300.

\2 "Spam Slows WorldNet Mail" - C|Net News (7/16/97)  
<http://www.news.com/News/Item/0,4,12512,00.html>

\3 "Spam Snags @Home Mail System" - C|Net News (2/25/98)  
<http://www.news.com/News/Item/0,4,19487,00.html>

\4 "Pacific Bell Suffers Slowdown" - C|Net News (3/13/98)  
<http://www.news.com/News/Item/0,4,20046,00.html>; "PacBell Fights Spam Explosion" - ZDNet (3/13/98)  
<http://www.zdnet.com/zdnn/content/zdnn/0313/294405.html>

\5 "Spam Clogs Netcom Lines" - C|Net News (4/29/97)  
<http://www.news.com/News/Item/0,4,10204,00.html>

\6 "Sprint Down for 5-hour Count" - C|Net News (9/3/96)  
<http://www.news.com/News/Item/0,4,3039,00.html> (discussing problems at both Sprint and GTE).

\7 Blocking and filtering of junk email has proven extremely ineffective in combating junk email. In order to block or filter email, you must first know where it is coming from. Then once you implement a block for that location, a junk mailer can rapidly change their location. For example, they may send mail via an America Online connection, then once that route is blocked, they will reconnect via CompuServe, then via Netcom, and so on. In Internet

parlance, these kinds of mailers are called "whack-a-moles," a reference to the popular carnival arcade game where you strike the mole with a mallet only to have it reappear somewhere else. Junk mailers obtain throw-away Internet accounts for one-time usage, bouncing from one ISP to the next, making up an address and launching their messages. While a receiving site can add that address to its filters, the spammer will seldom use that address again. Senator Murkowski's original bill, S. 771, proposed a mandatory "tag" on commercial email. However, filtering based upon advertising tags would not relieve the burden on Internet services providers or businesses whose facilities are already overwhelmed with massive quantities of junk email.

\8 One particular junk mailer has permutations of my email address on his list no less than five times. Whenever they take on a new client, I always get five copies of each and every ad. From the complaints received from CAUCE members, such situations are not at all uncommon.

\9 Small ISPs are often unable to afford the massive redundant systems that larger companies can afford. Thus, processing junk email can slow down all of the functions on servers that might be filling multiple critical functions such as a mail server, a web server, and a domain name server. Constraints on server capacity are also one of the reasons "filtering" schemes are not viable solutions for many ISPs; filtering email consumes vast amounts of processing capacity and is the primary reason most ISPs cannot implement it as even a partial strategy for eliminating junk email.

\10 In fact, in nearly every lawsuit on junk email-related issues, the actions of junk emailers have been found unlawful in one form or another. See, e.g., *Cyber Promotions, Inc. v. America Online, Inc.*, C.A. No. 96-2486, 1996 WL 565818 (E.D. Pa. Sept. 5, 1996) (temporary restraining order), rev'd (3d Cir. Sept. 20, 1996), partial summary judgment granted, 948 F. Supp. 436 (E.D. Pa. Nov. 4, 1996) (on First Amendment issues), reconsideration denied, 948 F. Supp. 436, 447 (Dec. 20, 1996), temporary restraining order denied, 948 F. Supp. 456 (E.D. Pa. Nov. 26, 1996) (on antitrust claim), settlement entered (E.D. Pa. Feb. 4, 1997); *America Online, Inc. v. Over the Air Equipment, Inc.* (E.D. Va. complaint filed Oct. 2, 1997), preliminary injunction entered (Oct. 31, 1997), settlement order entered (Dec. 18, 1997); *Bigfoot Partners, L.P. v. Cyber Promotions, Inc.* (S.D.N.Y. complaint filed Oct. 6, 1997); *In re Canter*, No. 95-831-O-H (Tenn. Bd. Prof. Resp. Feb. 25, 1997), disbarment order entered (Tenn. June 5, 1997); *CompuServe Inc. v. Cyber Promotions, Inc.*, No. C2-96-1070 (S.D. Ohio Oct. 24, 1996) (temporary restraining order), preliminary injunction entered, 962 F. Supp. 1015 (S.D. Ohio Feb. 3, 1997), final consent order filed (E.D. Pa. May 9, 1997); *Concentric Network Corp. v. Wallace*, No. C-96 20829-RMW (EAI) (N.D. Cal. complaint filed Oct. 2, 1996), stipulated judgment entered (Nov. 5, 1996); *Earthlink Network Inc. v. Cyber Promotions, Inc.*, No. BC 167502 (Cal. Super. Ct. L.A. County May 7, 1997) (preliminary injunction), consent judgment entered (Mar. 30, 1998); *Expert Pages v. Universal Networks, Inc.*, No. 97-1542 SI ENE (N.D. Cal. May 2, 1997) (temporary restraining order); *Parker v. C.N. Enterprises*, No. 97-06273 (Tex. Travis County Dist. Ct. complaint filed May 26, 1997), temporary injunction entered (Sept. 17, 1997), permanent injunction entered and damages awarded (Nov. 10, 1997); *People v. Lipsitz*, 663 N.Y.S.2d 468 (N.Y. Sup. Ct. 1997); *Prodigy Services Corp. v. Cyber Promotions, Inc.* (S.D.N.Y. filed Oct. 18, 1996), settlement entered (Dec. 13, 1996); *SimpleNet v. VNZ Information & Entertainment Services* (S.D. Cal. complaint filed Nov. 13, 1997), default judgment entered

(Apr. 15, 1998); Web Systems Corp. v. Cyber Promotions, Inc., No. 97-30156 (Tex. Harris County Dist. Ct. complaint filed June 1997), temporary restraining order entered (June 6, 1997).

\11 CAUCE expressed our concerns with that language directly to Senator Murkowski prior to the amendment's introduction. A copy of our letter to Senator Murkowski is attached and I wish to incorporate that letter into my testimony by this reference.

\12 Washington and Nevada already have measures on the books dealing with problems created by junk email. And numerous other states are considering legislation to address the harm done to businesses. Bills are pending in California, Colorado, Connecticut, Kentucky, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Virginia, and Wisconsin. Professor David Sorkin from the John Marshall Law School in Chicago maintains a web site tracking current legislation at: <http://www.jmls.edu/cyber/statutes/email/>.

\13 397 U.S. 728 (1970)

\14 341 U.S. 622 (1950)

\15 88 F.3d 729 (9th Cir. 1996)

\16 46 F.3d 54 (9th Cir. 1995)

\17 The bill also allows for businesses any number of ways to utilize the Internet to reach a prospective customer. For example, businesses can utilize banner advertising on popular web sites, create their own web site and register them with search engines, provide mechanisms for opting-in to email mailing lists, enter into linking arrangements with companies sharing common markets, and make targeted and topical postings to appropriate Internet bulletin boards.

\18 "Indonesia Revolt was Net Driven" - Boston Globe (5/23/97)  
[http://www.boston.com/dailyglobe/globehtml/143/Indonesia\\_revolt\\_was\\_Net\\_driven.htm](http://www.boston.com/dailyglobe/globehtml/143/Indonesia_revolt_was_Net_driven.htm)